



California Sportfishing
Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

January 24, 2011

Chair Phil Isenberg
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

**Subject: Impact of Monterey Plus Amendments and Kern Water Bank Transfer
on Alternatives for the Delta Plan**

Dear Chair Isenberg and Members of the Delta Stewardship Council:

We appreciate the opportunity the Delta Stewardship Council extended to the Environmental Water Caucus to develop a comprehensive and non-structural alternative for the Delta Plan. The California Water Impact Network and the California Sportfishing Protection Alliance are Caucus members, and we write this letter along with the Center for Biological Diversity to express our thoughts on some important steps for the reform and improvement of the management and operation of the State Water Project.

Our organizations are among several plaintiffs¹ who filed suit in June 2010 in Sacramento County Superior Court to overturn what are known as the "Monterey Plus" amendments to the long-term supply contracts for the State Water Project, which included the transfer of Kern Water Bank, the world's largest underground storage reservoir, from state ownership to private control. As explained below, these changes are perhaps the single greatest impediment to reforming SWP management and operation, and severely limit the Delta Stewardship Council's ability to recommend improvements to SWP operation as part of the Delta Plan.

Contrary to a common misconception, the Monterey Amendments, including the transfer of the Kern Water Bank, have been in place only on an *interim* basis, awaiting final approval by DWR and the conclusion of all legal challenges. That final approval was issued in 2010, but the legal challenges are ongoing. The Monterey Amendments' future is thus very much in question.

Between 1987 and 1992, drought conditions were so severe that SWP deliveries to agricultural contractors—consistent with the principles in place in the original SWP contracts—were nearly zero. Most of the water delivered in 1991 by the State Water Project, for example, was delivered to the Metropolitan Water District of Southern

¹ Other plaintiffs include the Central Delta Water Agency and South Delta Water Agency, Case No. 34-2010-80000561 in Sacramento County Superior Court, filed June 2, 2010. A parallel action was filed in Kern County Superior Court one month later.

California, whose customers are largely urban water districts south of the Tehachapi Mountains. This distribution pattern reflected in the SWP contracts a long-standing "urban preference" in state water law that domestic and industrial water rights holders (such as cities and counties holding water rights) would receive water first during droughts, prior to the claims of agricultural water users—on the belief that urban water should not be as easily 'interrupted' as can supplies for irrigated agriculture.

In 1985, the California Legislature added section 11258 to the Water Code, which required DWR to develop a south-of-delta groundwater storage facility. As a result, DWR acquired a 20,000 acre alluvial fan for this purpose from Tenneco Corporation in Kern County. These lands were developed into an underground storage reservoir known as the Kern Water Bank, to provide south-of-Delta storage capacity for the State Water Project and greater reliability for southern California urban water customers. DWR's portion of the Kern Water Bank had an initial build-out capacity of 350,000 acre-feet, with a second stage designed to increase the total storage to a million acre-feet.

In 1994, four State Water Project (SWP) contractors met secretly in Monterey with the California Department of Water Resources to resolve their water shortage issues. The result of their meeting was the Monterey Amendments to the State Water Project contracts. Under this secret deal, the State agreed to eliminate drought protections for urban areas (deleting Article 18(a)), deleted Article 18(b), an important provision that allowed the DWR to operate the State Water Project within its actual capacity (and thus not be based on "paper water"), and gave away the Kern Water Bank to agricultural contractors. To appease urban water interests that participated in this negotiation, DWR agreed to change the rules that control how, when, and under what circumstances so-called "surplus" water could be moved through the SWP (Article 21 'Surplus' Water).

These water management changes, promoted by the negotiating parties as mechanisms to enhance water management "flexibility," have contributed to the decline of the Delta by encouraging increased pumping during certain times of the year, in part through vastly expanding the market for private off-site water storage. They are each described in more detail below.

1. Elimination of Article 18(a). The "Urban Preference".

Article 18(a) was the "Urban Preference", the safeguard put in the contracts in 1960 to make sure that in times of prolonged dry weather, which occur in over one-third of years in California, agricultural allocations would be cut first.

2. Elimination of Article 18(b). The "paper water" safeguard.

Article 18(b) was put in the original contracts to make sure that the total amount of what was promised could actually be delivered on a "firm yield" basis. This clause in the contracts required the total amount of the Table A Allocations to conform to the "safe yield" of the SWP.

The true "safe yield" of the SWP is not the current Table A Allocation total of 4.23 million acre-feet per year (MAFY) because the contracts were premised on full build-out of State Water Project facilities, which has not occurred to date and will never occur in the future due to a number of factors, including several river systems being given state and federal protection. In fact, the average amount of water actually delivered between 1990 and 2000 was only 1.86 MAFY. (By 1990 all SWP contractors were requesting their full contract "entitlements.")

The difference between the 4.23 MAFY and the actual delivered average of 1.86 MAFY is known as "paper water." The Third District Court of Appeal (in its 2000 decision invalidating the prior environmental review of the Monterey Amendment) called this difference "a wish and a prayer."²

Developers and agricultural contractors in southern California did not want the State Water Project to reduce the "paper water" in the system to a smaller amount from 4.23 MAFY because they would have more difficulty showing there was enough water for their developments. This is still one of the most dangerous problems with "paper water" in California today.

Article 18(b) was eliminated in the Monterey negotiations with virtually no environmental review of its consequences.

3. Kern Water Bank Given Away to Private Ag Interests

As part of the Monterey Agreement, the Department of Water Resources turned over a state underground reservoir, the Kern Water Bank, to the Kern County Water Agency in exchange for the temporary retirement of 45,000 acre-feet of "paper water" allotments that had never been delivered.

As a SWP underground reservoir located south of the Delta, the Kern Water Bank was to be used by DWR to improve the reliability of southern California SWP allocations, especially in times of drought. Instead, the day after DWR gave the Kern Water Bank to the Kern County Water Agency, the Agency gifted the Kern Water Bank to a quasi-public Joint Powers Authority, majority controlled by a subsidiary of Paramount Farms, the giant farming company owned by billionaires Stewart and Lynda Resnick. In addition to Paramount, the Resnicks' holding company also controls such well-known brands as Pom pomegranates, Wonderful pistachios, Fiji water and Teleflora. According to tax returns, Paramount and other agricultural contractors valued the water that was already in the water bank (and given to them at no charge) at \$28 million. The Kern Water Bank itself is estimated to be worth at least \$100 million, yet the State never received anything of legitimate value in exchange.

This privatization of the Kern Water Bank allowed the water bank owners to buy cheap so-called "surplus" water (Article 21 water, see below), store it underground in their "bank", and then sell it to the highest bidder for large profits. The various subsidiaries of

² See Planning and Conservation League v. Department of Water Resources, (2000) 83 Cal.App.4th 892.

Paramount Farms have been doing this ever since taking over the water bank and have made many millions of dollars in profits off the tax payers of California.

4. Article 21 so-called "surplus" water.

In the early stages of the SWP, when not all contractors were using their full Table A Allocations, there was commonly available "surplus water" in the SWP system. Article 21 made that water available to other contractors who requested it. Today, however, all Table A Allocations are fully subscribed (and the SWP in total is far over-subscribed), making the concept of "surplus water" (aka "interruptible water") counter-intuitive. Yet this little-known category can still account for half of the total SWP water delivered to Metropolitan Water District and Kern County Water Agency in a given year. The Monterey Amendments enable state water contractors—particularly those in the southern San Joaquin Valley and those under the umbrella of the Metropolitan Water District of Southern California—to make much greater use of this surplus water. This has had disastrous consequences for land use planning in California.

For example, Article 21(g)(1) of the SWP contracts stated that deliveries of any surplus water would be refused if the delivery "would tend to encourage the development of an economy...which would be dependent upon" the surplus water. This necessarily precluded the use of surplus water for any permanent development, or even certain agricultural uses like tree crops that require water every year and cannot be fallowed. Egregiously, the Monterey Amendment eliminated this provision.

Combined with the privatization of the Kern Water Bank (and the development of other contractor-controlled water bank facilities), SWP contractors can now obtain delivery of "surplus water" for just the cost of transporting it within the SWP system, and can then hoard the water for later unrestricted use. Such uses include selling the water back—at a profit—to the State for the Environmental Water Account (described in detail by journalist Mike Taugher in his series on water sales for the Contra Costa Times in May 2009) and declaring huge quantities of the stockpiled water as a "supply" in order to satisfy Water Code and CEQA provisions and obtain development permits (as was done recently with Tejon Mountain Village in Kern County).

Exporting the Article 21 water from the Delta has devastating fishery impacts, particularly on migratory steelhead. The National Marine Fisheries Service considers Central Valley steelhead "threatened" with extinction in the region. The main stem Sacramento Valley steelhead population has plummeted from 19,615 spawning fish in 1968 to 339 in 2008. By allowing "surplus" Delta export pumping for 40 years under Article 21, California's government has failed to protect Central Valley steelhead populations from excessive water diversions.

The Monterey Amendment's Article 21 water program allows contractors to take delivery of water over and above approved and scheduled contract deliveries on a short-term, interruptible basis. Contractors are not supposed to count on these supplies year-to-year, but with the help of the Kern Water Bank, these itinerant supplies can be hoarded and re-

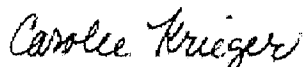
sold as a "dependable" year-round source for new development. And DWR and the contractors try very hard to prevent interruptions in this cheap source of water, regardless of whether California is in a drought or a wet year, and at the expense of steelhead and salmon habitat. In fact, "surplus" Article 21 water is pumped from the Delta in coordination with reservoir releases between November and April - the same time of year when adult salmon and steelhead return from the ocean to spawn in cold Central Valley streams. Their larvae hatch and rear in the floodplains and wetlands of the Central Valley and Suisun Marsh before the trout that will migrate to sea undergo key physiological changes and exit the Delta, provided these young salmon and steelhead avoid getting killed at the export pumps near Tracy.

Unfortunately, in this decade, heavy pumping through 2007 of this Article 21 water helped cause the Delta's open water ecosystem decline (which was first identified in 2005), as well as closure of the commercial salmon fisheries in 2008 and 2009. This is the water that federal judge Oliver Wanger and the new biological opinions covering Delta smelt and the salmon fisheries restricted sharply under the Endangered Species Act. With low precipitation and runoff since 2006, hydrologic restrictions have reduced Delta exports, but the dry conditions have also hindered recovery of the Delta's open water ecosystem and the Central Valley salmon resources that depend upon Delta through-flows and water quality during their life cycle. For this reason, restoring the limitations on runaway surplus water deliveries in SWP contracts would greatly assist in re-balancing the Delta exports.

In sum, we believe that one of the best ways to solve the state's water problems, particularly in dry or drought years, would be to overturn the Monterey Amendments. This would mean returning the taxpayer-created Kern Water Bank to the State's control to be used in dry times, as it was originally intended, to meet Urban Preference requirements. This would increase the real wet water that urban contractors could count on from their SWP contracts. Likewise, reinstating Article 18(b) would mean that the DWR could reduce the overall "entitlements" of "Table A" in each of the project contracts to water that the Department can actually deliver. This would ultimately lead to more reliable water service by the State Water Project to its contractors and more realistic forecasting of the project's actual water supplies and capacity.

In drafting the Delta Plan, we hope the Delta Stewardship Council recognizes and identifies the devastating impacts of the Monterey SWP contract amendments on state water policy, and recommends their reversal and/or reform. Thank you for your consideration of these important issues, and please do not hesitate to contact us with questions or concerns.

Sincerely,



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